Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

NORTH AMERICAN REVIEW.

No. CCCXXXII.

JULY, 1884.

JURIES AND JURYMEN.

"When the English adopted trial by jury they were a semi-barbarous people; they have since become one of the most enlightened nations of the earth, and their attachment to this institution seems to have increased with their increasing cultivation; . . . . many of its offspring have founded powerful republics; but everywhere they have boasted of the privilege of trial by jury."

THUS wrote De Tocqueville, fifty years ago. I do not believe the weight of opinion of the Anglo-Saxon race has shifted since. But murmurs against this time-honored institution are, no doubt, more frequently heard of late years than formerly. And they come not merely from disappointed litigants, but from intelligent journalists, whose quick eyes take in, as at a single glance, all the anomalous verdicts of the day; from doctrinaires, who look at all questions from their theoretical side alone; and from men of large business interests, who view with misgiving some of the men in the jury-box who are to pass upon their rights. No Anglo-Saxon institution is doomed, however, by a mere consideration of its imperfections. It is the genius of our race to look before and after, and to see what are the perils and inconveniences of the new before it displaces the old.

But, before considering the comparative merits of trial by judges or by jury, viewed as a question simply of the adminis-

54091
1

tration of justice, every statesman-like mind will recognize the educational influence of the jury system. It is by no accident that this system has been associated with free institutions. And although we may not go as far as De Tocqueville when he says that "the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes"; yet we shall agree with him that "it teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged; . . . . and this is the soundest preparation for free institutions."

Addressing ourselves now more particularly to the comparative value of this system as a means of determining legal controversies, we are impressed with the fact that the common law itself has grown up alongside of, and has been established in its principles with a reference to, the trial by jury; so that the latter has become a congruous part of the former. Certain elementary rules of law are so closely associated with this system of procedure that change in one would require alteration of the other. Let us take an illustration from the criminal, and also one from the civil law. Conviction of a crime can only be had when the jury are satisfied of the truth of every essential allegation of the Government beyond "a reasonable doubt." Define this term, or leave it as a phrase, the meaning of which is better felt than explained; in either case one sees that the reasonable doubt of twelve jurors is a different thing from the reasonable doubt of a judge. Where there is a strong trend of opinion in a jury toward the guilt of a defendant, each man's conviction naturally strengthens that of his fellow, and makes a doubt seem unreasonable which might seem otherwise, if there was no comparison of opinion. So, too, the reasonable doubt of a judicial temperament trained to an appreciation of all the possible aspects of evidence, and with a morbid sense of responsibility,—causing even resolution to be "sicklied o'er with the pale cast of thought,"—is one thing, and the reasonable doubt of a plain man of action, accustomed to decide upon quick impressions, and not upon subtle reasoning, is quite another.

It is one of the familiar principles of the law of negligence that a plaintiff in order to recover must show that he himself exercised due care; and that is defined to be "such care as men of ordinary prudence and capacity would take under like circumstances in the conduct and management of their own affairs."

Is it not clear that a jury composed of men of various ages, temperaments, and habits of life, and largely conversant with the busy activities of the day amid which accidents mostly occur, is better qualified to determine what the average man would do, than a single judge, of sedentary pursuits, of cautious habits of life, accustomed to the exercise of foresight, and with a prevision of accidents? And is it not also clear that twelve men can best eliminate that disturbing element which the psychologist calls "the personal equation?"

One of the serious consequences of compelling the court to try all questions of fact as well as law is the danger of thus impairing the confidence of litigants in its impartiality. All understand that the judge does not make, but declares the law; and so has no room for choice or personal bias. But in deciding facts he must necessarily judge and weigh parties and witnesses; and as the most ignorant think that they can decide readily as to facts while they know nothing of law, they assume to revise the judgment of the court; and what seems to them patent error they are apt to attribute to latent prejudice. Another serious objection to the proposed change would be the additional labor imposed on the judiciary. And it is important to observe, that it is not simply the amount of added labor that is to be taken into account, but the kind. The investigation of a mass of tangled facts and conflicting testimony is at once more foreign to the mental habits of the judge, more wearisome, and accompanied with less intellectual satisfaction than the solution of questions of law. Besides this, the judge who presides at jury trials must "gird up the loins of his mind" to decide at once the legal questions that arise; and then his duty is done. The responsibility ends there, and if parties are dissatisfied the question goes to a full court of appeals. But as to questions of fact, the decision of a single judge is final; and how oppressive this sense of responsibility sometimes becomes before a decision is reached, only those who have experienced it can estimate.

I advance nothing against the system which allows a choice to parties of their forum. In Massachusetts this works satisfactorily. The cases where neither party asks for a jury are generally either cases mainly of law or trivial in their nature, and though it is work rather to be shunned than sought, by alternations of brief service it is found not to be excessively wearisome.

In Boston about one-fifth of the cases are on the "court list." But if juries are to be retained as a necessary part of the judicial system, may they not be greatly improved? I think so; and I believe that the question as to how this may be done is one of great practical importance.

The theoretical qualifications of jurors in all the States are reasonably high. Thus, in Massachusetts, jurors are to be taken from the voters, and must be "persons of good moral character and of sound judgment"; and to make selection necessary it is provided that the list shall not include "more than one for every sixty inhabitants"; while in New York, the description of the citizen juror is that he should be "of fair character, of approved integrity, of sound judgment, and well informed"; and a slight property qualification is also annexed. But everything depends on the administration of this law; if "the good moral character" is as laxly interpreted as the same phrase practically is in the naturalization proceedings, it affords but little guaranty. The preparation of the jury lists is entrusted to various local tribunals or officers in the different States. It may not be well to interfere with this; but I venture to suggest that for the county courts, where the most important causes are tried, there should be some specially qualified supervising board, who should revise and reduce, and also have power to add to, the local lists. The clerks of the county courts, together with the high sheriffs, where they have not been degraded by political scrambles, might constitute such a board, as their action would be that of conspicuous public officers with a somewhat broad constituency, and, from their connection with the business of the courts, having a natural pride in the character of juries and a sort of responsibility to the judges under whose immediate eye their work would come.

The present selection of jurors is often heedless; sometimes even worse. Thus I have known men put on the lists who were unable to write, who so far from being of "sound judgment" were "feeble-minded," who were of intemperate habits, who were habitual violators of the law, and who had even been sentenced to the House of Correction for grave offenses. Such exceptional cases, of course, give no idea of the general composition of juries; nor when such men are on the juries, do they, in civil causes, where their lower passions and prejudices are not aroused, cause the mischief which might be anticipated, as

they are apt to be controlled by the stronger and better minds of their fellows. On the civil side the community suffers more from the low average which often fills the jury-box. While any attempt to give this popular institution an aristocratic cast ought to be resisted, yet, on the other hand, to be a truly representative body, the business and educated classes ought to share in it. The trouble is that such men are too largely out of the jury-box by their own procurement.

I have taken some pains to analyze the composition of juries in the city of Boston, because it is not unreasonable to suppose that they will compare well with those of any of the large cities of our country. And in the city of Boston there has been a perceptible improvement since the preparation of the lists has been taken from the City Council — where an Irish politician once succeeded in adding at one stroke four hundred of his clansmen — and committed to the Board of Registration of Voters. The Superior Court has exclusive jurisdiction of the great bulk of jury trials; and taking at random the list of jurors returned to serve at one of its late sessions, I find the aggregate number to be forty-seven. Of these, five are described as clerks (a *nomen generalissimum*, and vague enough to cover various capacities), three as grocers, two as in the liquor business, two as teamsters, two as unknown, one each as of the following occupations: agent, collector, commission merchant, compiler, constable, contractor, employment agent, engineer, hotel keeper, real estate agent, and superintendent; while the different branches of mechanical industry are represented by one blacksmith, bleacher, book-binder, box-maker, carpenter, gold-plater, laborer, molder, painter, paver, printer, stove-mounter, tailor, and upholsterer; and the traders have one dealer in each of the following: cigars, flowers, glass, pictures, produce, provisions, soda, and stoves. I give these details that we may have a more realistic impression of the actual jury. But in order to be sure that our facts are numerous enough to support our inductions, I have taken the pains to analyze six recent lists of jurors in Boston, returned to serve at terms of the Superior Court with the following classified results. The whole number aggregate 212. The few occupations highest in numbers are these: clerks 75, grocers 11, liquors 9, carpenters 7. All classes of traders are represented by 71, or about 34 per cent. of the whole; all classes of mechanics by 60, or about 28 per cent. There were

a great variety of clerical and miscellaneous occupations, but only two are described as merchants, two as commission merchants, three as brokers, four as real estate dealers, and one as lumber dealer and bank president (who, I remember, immediately claimed exemption as being over age). The professional classes are represented by a solitary physician. There is, in fact, no substantial representation either of the mercantile, banking, insurance, railroad, commercial, or large manufacturing interests of the city, and hardly a trace of the liberally educated class.

I have made no such study of the jury lists of other counties as of Suffolk. But the reader may be interested to see the result of an inquiry as to the jurors at the last term of court in the county of Bristol. There were nine farmers, two machinists, two manufacturers, two carpenters, two traders, and one each of other occupations as follows: Blacksmith, builder, butcher, capitalist, carriage-maker, jeweler, marble-worker, mechanic, merchant, nailer, saloon-keeper, shoe-maker. Bristol is partly an agricultural county, and we see its farming interests adequately represented; but it contains the three cities of Fall River, New Bedford, and Taunton, in which are seventy per cent. of the whole population; and these cities have large and diversified manufacturing and commercial pursuits, yet how feebly are they represented. Everywhere it seems to be assumed that men of active business are to be excused from jury duty, while they are the very ones who are not only the most apt to complain of the quality of the jury, but who have the largest interests to protect, and are most affected by unwise verdicts, which tend to unsettle the law as a practical guide.

There are many cases on trial which call to mind the remark of Fitz-James Stephen in regard to English juries:

> "The position in life and mode of selection of the jurymen certainly present a striking contrast to the character of the duties expected of them."

England, however, makes provision for special juries in particular cases. Mr. Forsyth says:

> "It may well be doubted whether Lord Mansfield would have been able to elaborate the noble system of mercantile law which has immortalized his name without the assistance of juries of merchants."

But in Massachusetts, and in many other of the States, there is no provision for what are called "struck juries," as there is in

England and in New York. The Code of the latter State provides that whenever it appears to the court that an impartial trial cannot otherwise be had, or "that the importance or intricacy of the case requires such a jury," it shall be ordered; and in such case the clerk selects forty-eight jurors from the whole jury list whom he deems best qualified, and therefrom the counsel of each party alternately strike out one till twenty-four are left; and from these the jury of twelve are selected and impaneled in the usual way. I doubt whether this is as wise or as consonant with the spirit of our institutions as it is to furnish to all litigants the best practicable juries, and to have them trained to act together in the course of common service. Such juries would not fail as a body to give due weight to the special knowledge of any of their members. It is apparent, however, that something ought to be done to secure in our larger cities a due proportion of jurors conversant with the important and complex questions growing out of modern business life.

It is a current notion that the reason why so few first-class business men are found upon our juries is that they are excused by the courts. The returns we have given show that such men rarely get upon the jury lists. In the exceptional cases where such men are returned to serve, it is no doubt one of the most important duties of a judge to brace himself up against yielding to any but the best of excuses. Boards of trade would do well not only to inculcate it as a point of honor that none of their members should seek to shirk this grave public duty, but also to see to it that their class be properly represented. And here let me add that the general hardship of jury duty is overestimated. I have repeatedly had business men at the end of a term confess to me not only the satisfaction they have felt in performing this function, and the interest they have felt in their work, but their surprise that it was so little onerous.

Connected with the elevation of the character of the jury is the question of their better treatment. The two reforms go hand in hand. It is no doubt essential to preserve the strict control of the presiding judge over the conduct of the jury; but it is now the aim of thoughtful judges to exercise this control with the utmost courtesy that circumstances allow. The jurors are, in truth, a part of the Court, sitting under the same solemn obligation, and engaged in the same serious duty. Respect from others tends to increase their self-respect. I cannot but feel that the more they are treated as gentlemen, the better will they

respond to the call upon them to act as such. I particularly object to the uncomfortable and unsanitary arrangements of most of our jury-rooms. This constitutes to many persons of delicate health or refined tastes the most serious objection to jury service; while to those in good health, and who are less fastidious, it is still an annoying discomfort, which disturbs the considerate and calm judgment so important in reaching impartial and accurate verdicts. In this suggestion of better accommodations for jurors, I am sure that I shall carry the assent of all reasonable men.

I cannot expect the same concurrence in my next suggestion, which is that in civil causes the presiding judge shall be permitted, in his discretion, to allow a jury to separate at night during their deliberations, and resume the case the next morning. The practice of the law begets conservative tendencies, and I fear the weight of opinion of the bar and bench may be against this innovation. I feel satisfied, however, that the change would be productive only of good results; and it is surely in the same direction as changes already made. Notwithstanding all just criticisms upon the composition of juries, I have no doubt that in the main they have improved in manliness and integrity with the general elevation of public morals; and that wise policy and the interests of justice require for them different treatment from that which jurors received in the olden time, when they were kept without fire or food till they agreed, or the judge relented; and were liable, if they did not seasonably agree, to be carted from town to town as the Court traveled the circuit. So till a modern date the jury were not allowed to separate during any part of the time of a criminal trial, even in cases of misdemeanor simply. Gradually the rule was relaxed as to these, then even in felonies, but continued as to capital cases. New York has parted with this relic of an old civilization, while it still exists in many of the States.*

In the case cited these remarks of the Court have a pertinent application to the general question:

"There were reasons for these rules at an early day which do not now exist. The jury were then comparatively ignorant, subject to the control of their superiors, and easily led astray. They had but faint notions of popular rights, and submitted to restrictions which would not now be tolerated. Trials were brief, seldom occupying an entire day."

* See Stephen *vs.* People, 19 N. Y. 550.

The only objection that can be made against this indulgence to the jury in civil causes while considering their verdict is the supposed danger of approach in some way by interested parties. This danger can be but slight. To the credit of human nature, as well as to the credit of human sagacity, attempts to influence jurors are of the rarest occurrence. To be successful there must be concurrent depravity in two persons; and while failure is ignominious and dangerous, success is hardly less so. The summary power of courts to punish, as for a contempt, the slightest interference with a jury, induces a wholesome fear of such action. Besides, if it is contemplated, there are ample opportunities for it during the progress of the trial when juries are always allowed to go home at the adjournment, instead of postponing the attempt until it may chance to be too late. To be consistent, we should go back to the old rule in criminal causes, and keep the jury under constant surveillance from first to last. The advantages of such a change of practice are obvious. A great part of the discomfort of jury service is removed, and men whose business or family cares press so heavily on them when they are not sure of an hour in the twenty-four at home, would find it quite possible to serve with equal mind if the public would leave to them the usual rest from labor. But the main argument for the change is that in this way a result is reached not by the pressure of any physical discomfort, nor by anxieties for others, but as the result of calm deliberation. And if a night could be spent away from the heated disputation of the jury-room, it would not infrequently happen that a dissentient juror would, as the result, perhaps, of what Dr. Carpenter calls "unconscious cerebration," see things in a clearer light on the morrow.

The rule requiring unanimity in a jury, so far as it applies to civil cases, has long been disapproved by very eminent authorities. Bentham, with a coarse vigor of expression outrunning the truth, describes it as a system of "perjury enforced by torture." Forsyth more mildly says: "A more lax view of the individual obligation of each is adopted on account of the mischief which results from a final disagreement"; while Hallam bluntly calls it "that preposterous relic of barbarism." It is more to the purpose to notice the conclusion and the reasoning of that body of experts appointed by the English Parliament on the Courts of Common Law in 1830. They say: "It seems absurd that the rights of a party in questions of a doubtful and complicated

nature should depend upon his being able to satisfy twelve persons that one particular state of facts is the true one." And they propose that after twelve hours the opinion of nine shall authorize a verdict. Lord Campbell many years after introduced a bill to carry such a measure into effect. But hitherto all efforts at disturbing the rule have failed.

Professor Robertson, in the ninth edition of the "Encyclopedia Britannica," while indorsing the theoretical views to which we have alluded, suggests the reason of the failure of all projects for change in England:

> "We rarely hear of juries disagreeing or of jurors agreeing under compulsion. When civil juries were established in Scotland, this was one of the arguments used against the experiment; but it has been stated by the judge under whom the system was started, that he only knew of one instance of disagreement during a period of twenty years. English experience is much the same, and a reform which twenty or thirty years ago was pronounced absolutely necessary by conservative jurists is now hardly ever heard of."

I do not know how accurately he has stated the fact as to England, but I am sure that in America disagreements are far more frequent. Combining my own experience with information from others, I should say that in Massachusetts the average number of disagreements would be about five per cent. of the whole number of cases tried. It is also well to remember that the cases in which juries disagree are apt to be those of most importance and of the longest duration.

It were an interesting speculation to seek the causes of this difference in the frequency of disagreements in England and in America. Both Prof. Robertson and Mr. Forsyth lay great stress upon the influence of the judge in his charge toward the determination of the verdict. The latter says: "The presiding judge has, by the tendency and bias of the remarks which he makes in summing up, the means of influencing and guiding them to a right result; and they have generally the good sense to avail themselves of all the help afforded by his perspicuity." Although the practice may differ somewhat in the different States of our Union, and some allowance must always be made for personal idiosyncrasy, it is safe to assert that the American trend has been toward a more complete separation of the functions of court and jury, and several of the States have enforced this by special statutes. In Massachusetts, for instance, it is provided that "the courts shall not charge juries with respect to matters of

fact." Throughout the United States it would be an unusual and an uncomplimentary description of a charge from the bench to say that its "bias" helped to guide the jury to a right result. I am by no means sure that we have the better practice, tested by its utility; but we are not likely soon to change it.

Meantime, disagreements of juries go on with loss to the pockets and peace of mind of litigants and with cost to the public in expense and time. If it could be assumed that the dissentient jurors were fairer or wiser than the majority, we could tolerate it well; but, unfortunately, the alliance between ignorance and obstinacy, well known of old, continues to the present day.

There are, no doubt, exceptional cases where the majority may be carried away by popular prejudice or personal sympathy, and to meet such cases the concurrence of the presiding judge might be required in order to make valid a majority verdict. I am fully aware that such a change in jury trial as to dispense with unanimity would require some constitutional changes as well as legislation. No one proposes to disturb the present rule in criminal cases, because it well consists with the great principle that no one is to be convicted while there remains a reasonable doubt of his guilt. But in civil cases, where a preponderance of evidence alone is required, it would seem that, sooner or later, the practical American mind would conclude that when this preponderance was made out to the satisfaction of at least three-fourths of the jury and of the court, it was time to make an end of the litigation, especially when we consider that this state of things would almost certainly foreshadow the ultimate result, the present acceptance of which would merely avoid one of those calamitous delays of the law which have tired out sturdier natures than that of Hamlet.

ROBERT C. PITMAN.